RECENT DECISIONS.

ADMINISTRATIVE LAW—MANDAMUS—COURT. The petitioner in this action was sued at law and set up certain equitable defenses. He also filed a motion to transfer the cause to the equity side of the docket. The motion was overruled, and the petition is now brought to compel the transfer to the equity side of the court by mandamus. *Held*, this is a matter to be reviewed by appeal or writ of error, but not by mandamus. *Horton* v. *Gill. Judge* (Ind. Terr., 1904) 82 S. W. 718.

Where a court improperly refuses to act or unreasonably delays its action, mandamus will lie to force it to proceed. High. Extr. Legal Remedies, §147. Mandamus is, however, never employed to determine what the judgment of a court should be, nor to make it take a particular action, ex parte *Loring* (1876) 94 U. S. 418; *Sprague* v. *Fawcett* (1879) 53 Cal. 408. The sole purpose of the writ is to force the doing of a ministerial, not a judicial act. Hence a court may be forced to take jurisdiction, where such is its duty. *Temple* v. *Superior Court* (1886) 70 Cal. 211; or having jurisdiction it will be compelled to proceed; but having done this, its proceedings cannot be reviewed, nor its rulings revised by mandamus. Under these generally recognized doctrines the principal case was correctly decided. The court heard the motion to transfer the case to the equity side of the court, and overruled it. Here was an exercise of discretion which cannot be reviewed by mandamus, nor does the wording of the statute on which the dissenting opinion relies seem to justify the conclusion that the determination of the question was ministerial rather than judicial.

ADMINISTRATIVE LAW—REMOVAL OF JUDGE—QUO WARRANTO. Application was made to the Appellate Division of the Supreme Court for the removal of Herman Bolte, Justice of the New York Municipal Court. Laws 1901, p. 576, C. 466, § 1353 provide that a municipal court justice shall be a resident and elector of the district for which he is elected, and the Public Officers Act, Laws 1892, p. 1656, C. 681, declares that every office shall be "vacant" before the expiration of the term thereof upon the incumbent's ceasing to be an inhabitant of the political subdivision of which he is required to be a resident when elected. The proceedings arose upon an order to show cause, granted upon a verified petition of the District Attorney, which charged that respondent was no longer a resident of his district, that he was guilty of reckless exercise of judicial functions without regard to the rights of litigants, gross favoritism, absence from court during the hours prescribed by the Municipal Court Rules, judicial oppression and conduct unbecoming a judge. On a motion to dismiss, it was *held*, such motion is in the nature of a demurrer, that the Appellate Division is vested by Const., Art. 6, §§ 2, 17; Laws 1880, p. 521, C. 354; Code Civ. Pro., § 220, and Laws 1901, p. 589, C. 466 (Rev. Charter Gt. N. Y., § 1383) with authority to remove justices of inferior courts, and that respondent's acts were cause for removal, *Matter of Bolte* (1904) 97 App. Div. 551.

When an officer has been duly elected and has qualified, the authorities are in conflict as to whether quo warranto will lie to remove him *State* v. *Gardner* (1869) 43 Ala. 234, holds that it will not. Contra: *State* ex rel. *Vance* v. *Wilson* (1883) 30 Kan. 661. When the alleged forfeiture has been caused by a criminal act, there must be a conviction, with jury trial, before quo warranto can be brought. *Commonwealth* v. *Jones* (Ky., 1874)

10 Bush. 725. Contra: *Royall* v. *Thomas* (Va., 1877) 28 Gratt. 130. However, forfeiture for cause other than crime may always be found by the court for itself in quo warranto proceedings. *State* ex rel. *Vance* v. *Wilson*, supra; *People* ex rel. *Atty.-Genl.* v. *Heaton* (1877) 77 N. C. 18; *Comm.* v. *Allen* (1872) 70 Pa. 465. But in the principal case the legislative provision created ipso facto a forfeiture, and thereafter respondent was a de facto officer, analogous to one holding over after the expiration of the term, *Oliver* v. *Mayor* (1899) 63 N. J. L. 634, and to oust him from possession of the office, illegally held, quo warranto, would lie, as his counsel contended, brought either by an adverse claimant or by the Attorney General. Compare *State* v. *Hixon* (1872) 27 Ark. 398. Without deciding this question, the court properly held that it had authority, upon the entire charges, under the statutes above cited, to make the removal.

AGENCY—RIGHT OF ATTORNEY TO ACT IN LUNACY PROCEEDINGS—REVOCATION—INSANITY. A employed attorneys to defend him in an anticipated lunacy inquisition. Thereafter he became so insane that when the proceedings were instituted he did not know their nature. *Held*, that such insanity revoked the agency and the attorneys had no right to be heard at the trial nor to prosecute an appeal therefrom. *Chase* v. *Chase* (Ind. 1904) 71 N. E. 485.

The insanity of the principal revokes the agency. Story on Agency, § 481, and cases cited. On the other hand, Kent favors the view that insanity should not act as a revocation until it is judicially established. 2 Kent, 645; *Wallis* v. *Manhattan Co.* (1831) 2 Hall 495. The latter view seems preferable whenever insanity is at issue in a legal proceeding. Otherwise, as in the principal case, when a person is alleged to be insane and defends by counsel, the sanity of the person must first be established before the attorney is qualified to defend his client in the lunacy proceeding.

CARRIERS—LIMITATION OF LIABILITY—NEGLIGENCE OF SERVANTS. An action for damages was brought for injury to a cargo of grain which had become heated during the voyage because of negligent stowage. The defence set up express exemptions in the bill of lading in case of damage from "sweating * * * perils and accidents of the seas * * * whether any of the things above mentioned or loss or injury be occasioned by the negligence or default of * * * any persons in the service of the shipowners. In no case is the company to be held liable for heating or any other damage to the goods." *Held*, the defendants were liable as the language was not sufficiently clear and unambiguous to exempt the carrier from liability for negligence. *The Fearlmoor* [1904] P. 286.

The courts are reluctant to allow any exemption from liability by stipulation unless negligence is expressly mentioned. *Price* v. *Lighterage Co.* [1904] 1 K. B. 412. In the principal case it would seem that the rule of interpreting the exception most strongly against the carrier was carried to the extreme. The U. S. Supreme Court as well as most of the States deny outright a carrier's right by contract to exempt itself from liability for the negligence of its servants. *Steamship Co.* v. *Phœnix Ins. Co.* (1889) 129 U. S. 397. Hutchinson on Carriers, §§ 260–262. New York is in accord with the English rule in that it permits such limitations of liability provided express terms are employed. *Magnin* v. *Dinsmor* (1874) 56 N. Y. 168; *Canfield* v. *B. & O. R. R.* (1883) 93 N. Y. 532; see 1 COLUMBIA LAW REVIEW, 488; 2 id. 330; 3 id. 484; 4 id. 597.

CARRIERS.—RELATION OF EMPLOYEE OF EXPRESS COMPANY TO THE RAILROAD. An express messenger while riding free in a car furnished by a railroad company to the express company which employed him was injured by the derailment of a train. *Held*, the express messenger, occupy-

ing a relation to the railroad company analogous to that of its own employees, could not recover. *Chicago & N. W. Ry. Co.* v. *O'Brien* (C. C. A. 8th Circ. 1904) 132 Fed. 593.

As a general rule the courts have declined to regard the express messenger as in the position of a railroad employee. 4 COLUMBIA LAW REVIEW 592. The court in the principal case, however, has found an effective working rule which will preclude an express company's employee from recovering from a railroad company except under such circumstances as a servant could sue his master. It would seem to follow from this decision that a release or distinct assumption of risk by the express employee is unnecessary to relieve the carrier from liability. Heretofore a conscious assumption of risk has been insisted upon. See COLUMBIA LAW REVIEW, *supra*. It is submitted that a rule which imposes on the employee of one employer all the risks incident to the service of another extends the doctrine of the decided cases.

CONSTITUTIONAL LAW—EMINENT DOMAIN—PUBLIC USE. Under a statute declaring mining a public use and authorizing the exercise of eminent domain for such purpose the plaintiffs had procured the condemnation of the defendant's land for the construction of an aerial tramway. The defendants set up the unconstitutionality of the statute. *Held*, the statute was constitutional, since the use was a public use. *Highland Bay Gold Mining Co.* v. *Strickley* (Utah, 1904) 78 Pac. 296.

The principal case is another example of the difficulty of formulating a test for a public use. 4 COLUMBIA LAW REVIEW 133. It is not justified in the idea that the people may to some extent be entitled to use the property. *Gaylord* v. *Sanitary District* (1903) 203 Ill. 576, or that its use would directly benefit the public. *Olmstead* v. *Camp* (1866) 33 Conn. 532. As has been pointed out, "Every lawful business in a sense confers a public benefit." *Ryerson* v. *Brown* (1877) 35 Mich. 333. The case is one differing from those where the power of eminent domain is invoked in behalf of public service companies, and is one that illustrates a desire to further the economic interests of a section in the development of natural resources such as water power, mines, oil wells, etc. *Mining Co.* v. *Parker* (1871) 59 Ga. 417.

CONSTITUTIONAL LAW—POWER OF THE LEGISLATURE TO REGULATE MUNICIPAL CONTRACTS. A contractor under a contract with the City of New York for the construction of scows had agreed to comply with the provisions of the "Labor Law," Laws of 1897, c. 415, so far as they were constitutional. The Comptroller resisted payment on the ground that the contractor had employed workmen for more than eight hours a day, whereupon the latter brought mandamus. *Held*, such provision was in contravention of the State Constitution and the relator could prevail. *People* ex rel. *Cossey* v. *Grout* (1904) 179 N. Y. 417.

The case of *Ryan* v. *City of New York* (1904) 177 N. Y. 271, recognized the constitutionality of legislation regulating the rights of a municipal corporation to contract with its own employees. Following *People* ex rel. *Rodgers* v. *Coler* (1901) 166 N. Y. 1, the principal case holds that such regulation when applied to the municipality's contracts with subcontractors as to the pay or hours of labor of the employees of the latter is in derogation of the home rule principle of the Constitution. Without handling the question as to whether the power would not exist in one case as well as in the other, a distinction is made on the facts on the ground of advisability. The real question would seem to have been decided adversely in *Atkin* v. *Kansas* (1903) 191 U. S. 207. See 4 COLUMBIA LAW REVIEW 127. Until further adjudication the law in New York would seem to be that the home rule principle permits legislation regulating the terms on which a city may contract with its immediate employes. *Ryan* v.

City of New York, supra; that it forbids (a) legislation regulating the terms upon which a city may contract with its subcontractors as to rate of wages, *People* ex rel. *Rodgers* v. *Coler*, supra, or hours of labor, principal case, and (b) legislation making it a misdemeanor to require more than eight hours' labor on a municipal contract. *People* v. *Construction Co.* (1903) 175 N. Y. 84.

CONTRACTS—DELIVERY IN ESCROW. A husband executed a deed to his wife and deposited it with a third person, to be delivered in case the grantor again became intoxicated. At the time of his death the deed had not been delivered, though the condition had been satisfied. *Held*, since there was no contract pursuant to which the deposit had been made, the depositary was only the agent of the grantor and his authority was terminated by the death of the grantor. *Bosea* v. *Lent* (1904) 90 N. Y. Supp. 41.

The depositary of an escrow is usually called the agent of both the parties to the instrument; *Davis* v. *Clark* (1897) 58 Kan. 100; *Olmstead* v. *Smith* (1885) 87 Mo. 602; but neither the death of the grantor or of the depositary will defeat the escrow; *Ruggles* v. *Lawson* (1816) 13 Johns. 285, and since it is essential that neither party shall have acquired the instrument, *Cook* v. *Brown* (1887) 34 N. H. 460; *Cocks* v. *Barker* (1872) 49 N. Y. 107, it would seem more accurate to regard him as impersonal or an automaton. The court in the principal case having found that the grantor had never released control of the deed no escrow was created.

CONTRACTS—STATUTE OF FRAUDS—SUFFICIENCY OF MEMORANDUM. An action was brought by a vendee for the specific performance of a contract for the sale of land. The contract was evidenced by a memorandum which stated how certain installments of the consideration were to be paid, but did not mention the manner of payment of the residue. *Held* that oral evidence is admissible to show when the remainder of the consideration was to be paid. *Ruzicka* v. *Hotovy* (Neb., 1904) 101 N. W. 328.

This decision is contrary to the weight of authority, the general rule being that a contract for the sale of land to be valid must contain the precise terms of payment. *Wright* v. *Walker* (1862), 25 N. Y. 153; *Nelson* v. *Baby Manufacturing Co.* (1892) 96 Ala., 515; *Snow* v. *Nelson* (1902) 113 Fed. 353. Whenever the statute provides that the consideration must be stated there is no doubt that all the terms of payment are intended. If the statute does not stipulate for mention of the consideration, yet it would appear that the word contract should include all the terms thereof. Such interpretation is in accord with the weight of authority and seems more in consonance with the purpose of the statute than that adopted by the principal case. *O'Donnell* v. *Leeman* (1857) 43 Me. 158; Browne on the Statutes of Fraud, 4th ed., § 379 et seq.

CORPORATIONS—ACTION OF DIRECTOR OF FOREIGN CORPORATION UNDER CODE. The plaintiff, a director of a foreign corporation, sued the defendants, former directors, who, while in office had converted corporate property to their own use, for an accounting and restoration to the corporation of the funds converted. *Held*, in overruling the demurrer, that the plaintiff is entitled under the N. Y., Code of Civ. Pro., §§ 1781, 1782, 1809, 1810, 1811, 1812, to the relief sought. *Miller* v. *Quincy* (1904) 179 N. Y. 294.

Although directors are not technically trustees, because title to corporate property is in the corporation, still, the relation being in its nature fiduciary, they are generally held to the liability of a trustee. Morawetz Corporations, 2nd ed., § 516. So if a director misapplies corporate property he may be compelled in equity to account to the corporation. *Bosworth* v. *Allen* (1901) 168 N. Y. 157. The N. Y. Code, §§ 1781, 1782, provides that such actions may be maintained by a director against trustees,

directors, managers and other officers "of a corporation" for an accounting and restoration. *Beecher* v. *Scheiffelin* (1883) 4 Civ. Pro. Rep. 230. The contention in the principal case was that this applied to domestic corporations only; but the court pointed out that §§ 1809, 1810 and 1811, which supplement the above two sections are by § 1812, made specifically applicable to foreign corporations, and that it is therefore inferrable that §§ 1780, 1781 were intended to have the same effect. There is no doubt that a foreign corporation could itself invoke the aid of a New York court of equity to compel defaulting directors to account, if they could be found within the jurisdiction of the court. *Ernst* v. *Rutherford Gas Co.* (1899) 38 App. Div. 388, 391. The Court of Appeals by placing the above construction on the Code has made the right of "a creditor, trustee, director or manager" of a foreign corporation coextensive with the right of the corporation itself.

CORPORATIONS—RELIGIOUS SOCIETIES—MARKETABILITY OF TITLE. The plaintiffs, trustees of the Shaker Society, brought suit to enforce the specific performance of a contract to buy land. The defendant objected on the ground that the title was not marketable, there being a statute with which the society had not complied, requiring religious corporations to obtain an order from the Supreme Court before conveying real estate. *Held*, that although the society had received from the legislature the power to hold land in perpetual succession, it had never received a franchise from a state to exist as a corporation and it was nothing more than an unincorporated association exercising a corporate power. *Feiner* v. *Reiss* (1904), 90 N. Y. Supp., 568. See NOTES, p. 154.

EQUITY—JURISDICTION—INJUNCTION—EXTRATERRITORIAL PROPERTY. The plaintiff sought an injunction to restrain the defendant from trespassing on land outside the jurisdiction of the court. *Held*, a court of equity has no jurisdiction to restrain trespass on land outside the jurisdiction, even though the defendant is within the jurisdiction. *Cincinnati, etc., Tpk. Co.* v. *Cincinnati, etc., Trac. Co.* (Ohio, 1904) 15 Dec. 118.

Though in the case of trusts, specific performance and mortgages, equity has jurisdiction regardless of the location of the land, the cases are in conflict as to whether, in the case of trespass, it can act if the property is without the jurisdiction. It has been held that jurisdiction of the defendant's person is sufficient, *Great Falls Mfg. Co.* v. *Worster* (1851) 23 N. H. 462, though the weight of authority is otherwise. See 2 COLUMBIA LAW REVIEW 51. The reason for the denial of jurisdiction in such cases is that an action to try title should not be made transitory by the device of suing in equity.

EQUITY—SPECIFIC PERFORMANCE—NEGATIVE COVENANTS. In connection with the sale of a newspaper business the defendant contracted not to engage again in the same business in that town for five years. After one year he began the publication of another paper within the prescribed limits. In an action for specific performance he offered to show that his breach had caused the complainant no financial loss. *Held*, the covenant being negative, equity will grant specific performance regardless of the adequacy of his legal remedy. *Andrews* v. *Kingsbury* (Ill. 1904) 72 N. E. 11. See NOTES, p. 153.

EVIDENCE—ADMISSIBILITY OF SUICIDAL DECLARATIONS. The defendant, on trial for the murder of his wife, offered in evidence her declarations tending to show an intention to commit suicide. *Held*, expressions, made two months prior, were admissible; but expressions made from eleven months to four years prior, being too remote, were inadmissible. *State* v. *Kelly* (Conn. 1904) 58 Atl. 705. See NOTES, p. 157.

EVIDENCE—CONFESSIONS—BURDEN OF PROOF. In a criminal prosecution the defendant objected to the introduction in evidence of a confession made by him to the sheriff, claiming that it was involuntary and made under inducement. *Held*, where the confession appears to be free and voluntary, the burden is upon the defendant to show such coercion or inducement as to require its exclusion. *State* v. *Icenbice* (Ia. 1904) 101 N. W. 273.

The orthodox rule appears to be that the prosecution should show affirmatively the voluntary character of the confession before admission. *Jackson* v. *State* (1887) 83 Ala. 76; *People* v. *Soto* (1874) 49 Cal. 69. The English doctrine requires such showing only when a doubt is raised. *Rex* v. *Thompson* (1893) L. R., 2 Q. B. 12, 18. In a few of the States a view conformable to that of the principal case is held, requiring the defendant to rebut a presumption that the confession is voluntary. *Com.* v. *Culver* (1879) 126 Mass. 464. Greenleaf on Evidence, 16th ed. § 219b. Since the prisoner usually has only his unsupported statement to establish the threat or inducement, the principal case would seem to impose an undue burden. See 1 COLUMBIA LAW REVIEW, 556.

EVIDENCE—CORONER'S VERDICT—ADMISSIBILITY IN CIVIL ACTION. In an action to recover the amount of an accident insurance policy, the verdict of a coroner's jury was offered to show that deceased had committed suicide. *Held*, such evidence was not admissible. *Ætna Life Ins. Co.* v. *Milward* (Ky. 1904) 82 S. W. 364.

The opposite view finds support on the ground that such a verdict, being secured by a public officer, under his official oath, in the discharge of his official duty, and filed with the circuit court, is therefore a record of that court. *U. S. Life Ins. Co.* v. *Vocke* (1889) 129 Ill. 557; *Grand Lodge* v. *Wieting* (1897) 168 Ill. 408. Such evidence while competent is not conclusive. *Metzradt* v. *Modern Brotherhood* (1900) 112 Ia. 522. But in an action for damages for injuries resulting in death, that part of the coroner's verdict imputing negligence to the defendant was correctly excluded. *Cox* v. *C. & N. W. Ry. Co.* (1900) 92 Ill. App. 15. Whatever the historical character of the coroner's office, it cannot be said that under modern statutes a coroner's inquest is a judicial proceeding to the extent that its verdict should affect any stranger to such proceeding. *Cox* v. *Royal Tribe* (1903) 42 Or. 365; *Wasey* v. *Traveler's Ins. Co.* (1901) 126 Mich. 119: *Goldschmidt* v. *Mut. Life Ins. Co.* (1886) 102 N. Y. 486. The purpose of such inquisition is to furnish foundation for criminal prosecution in case death was caused by felony. *Germania Life Ins. Co.* v. *Lewin* (1897) 24 Colo. 43. In criminal prosecutions the verdict of the coroner's jury is not admitted in evidence for the reason that in proceedings before the coroner there is neither confrontation nor an opportunity for cross examination. *Whitehurst* v. *Commonwealth* (1884) 79 Va. 556; *People* v. *Coughlin* (1887) 67 Mich. 466.

MASTER AND SERVANT—ASSUMPTION OF RISK—PROMISE TO REPAIR. The plaintiff, foreman of a gang of riveters, called the attention of the foreman of carpenters to a defect in a scaffold upon which the plaintiff was to work. It was the carpenter's duty to build and repair the scaffold and he promised he would attend to it. He failed to do so and the plaintiff was injured in consequence. *Held*, a promise to repair given by one foreman to another is not sufficient to suspend the latter's assumption of risk, because, being based upon contract, it can only be removed by a like contract. *Hemstock* v. *Lackawanna I. & S. Co.* (1904) 90 N. Y. Supp. 663. See NOTES, p. 158.

PLEADING AND PRACTICE—LIMITATION OF ACTIONS AGAINST MUNICIPAL CORPORATIONS—TIME OF ACCRUAL. The plaintiff brought this

action as administratrix under a code provision twenty months after decedent's death but within five months of the issuance of letters of administration. A statute provides that actions of this nature must be brought within one year after the cause of action has accrued. Laws of New York 1886, p. 801. *Held*, that such cause of action accrued not on the issuing of letters of administration but upon decedent's death, and was therefore barred. *Crapo* v. *City of Syracuse* (1904) 90 N. Y. Supp. 553.

This precise question involved has not, as yet, been adjudicated by the Court of Appeals. A different department of the Supreme Court held in an earlier case that such a cause of action did not accrue until the issuing of letters of administration. *Barnes* v. *City of Brooklyn* (1897) 22 App. Div. 320. There are dicta supporting the principal case. *Matter of Meekin* v. *B. H. R. R. Co.* (1900) 164 N. Y. 145; *Cavenagh* v. *Ocean Steam Nav. Co.* (1890) 13 N. Y. Supp. 540. The principal case seems the better interpretation of the legislative intent. The contrary view would make it possible to defeat the purpose of the statute by delay in taking out the letters of administration.

PLEADING AND PRACTICE—REMITTITUR ON APPEAL—PERSONAL INJURY. On appeal in an action for personal injuries, the only error assigned was that the excessive award of damages indicated passion, prejudice or caprice. *Held*, the appellate court may, without usurping the province of the jury, require a remittitur of the damages by the plaintiff as a condition of affirmance. *Alabama, etc. R. Co.* v. *Roberts* (Tenn. 1904) 82 S. W. 314.

An appellate court may require a remittitur where the damages are easily ascertainable in cases in which the error has been one of mere calculation, *Union, etc. Ins. Co.* v. *Pottker* (1878) 33 Oh. St. 459, or where part of the damages have been erroneously awarded. *Genet* v. *Canal Co.* (1900) 163 N. Y. 173. This right of the appellate tribunal is now generally recognized also in cases of unliquidated damages for torts. *Holmes* v. *Jones* (1890) 121 N. Y. 461; *Elgin City R. Co.* v. *Salisbury* (1896) 162 Ill. 187. Where, however, the verdict is tainted by passion and prejudice, it has been held a new trial is necessary. *Stafford* v. *Pawtucket, etc. Co.* (U. S. 1862) 2 Cliff. 82. The tendency of the authorities, however, is in accord with the principal case. *Ark. etc. Co.* v. *Mann* (1888) 130 U. S. 69. This tendency to allow the court to encroach upon the jury functions is a dangerous one and should be restricted to a greater degree than in the principal case.

PLEADING AND PRACTICE—RES JUDICATA—TESTIMONY OF TRIAL JUDGE INCOMPETENT. By his will a testator provided for his wife an income of $15,000 a year; he then gave $2,100,000 to certain colleges. The remainder of his property he bequeathed absolutely to his executors, as residuary legatees, with the understanding that they would carry out his wish of turning over such remainder to the same colleges. In a suit in the State supreme court, brought by some of the colleges to have the residuary estate declared a trust in the hands of the executors, the contestants, as respondents, put in an answer and a counterclaim to have certain releases, which they had signed, yielding up all claims on the estate, declared void as obtained through fraud. The decree of the court was that the residuary estate passed as a trust; no special finding was made as to the claim of fraud. On appeal the judgment was affirmed. In an action in the U. S. Circuit Court by the contestants against the executors to have the releases set aside, the executors' plea of res judicata was sustained, and it was *held*, that the testimony of the trial judge that he did not consider the validity of the releases was not competent. *Fayerweather* v. *Ritch* (1904) 195 U. S. 276.

Any matter, necessarily and directly in issue, which is adjudicated by a court of competent jurisdiction, thereby becomes, except in proceedings

of direct review, finally settled and conclusive on the parties. *Sargent* v. *Steamboat Co.* (1894) 65 Conn. 116; *Bartlett* v. *Goodrich* (1897) 153 N. Y. 421. This would apply even to a mistake of fact. *Queen* v. *Inhabitants of Hastington* (1855) 4 El. & B. 780, and to a matter not specifically put in issue by the pleadings, if it be essential to the judgment. *Lee* v. *Kingsbury* (Tex. 1854) 62 Am. Dec. 546; *Board of Supervisors* v. *R. R.* (1869) 24 Wis. 93, 124; *Pray* v. *Hegeman* (1885) 98 N. Y. 351, 358. In the principal case the matter was expressly pleaded. There was, moreover, no ambiguity in the issues presented, which would have justified testimony outside the record. *Washington, etc. Co.* v. *Sickles* (1860) 24 How. 333. The trust was, under the circumstances, contrary to statute, and illegal except for a waiver of the statute by the contestants. The only waiver before the court consisted in the releases; the decision of their validity was therefore necessary to the decision. The subsequent testimony of the trial judge that in deciding the case he did not consider the question of their validity, was rightly held not competent.

REAL PROPERTY—CONSTRUCTION OF CONTINGENT LIMITATIONS IN WILLS. A testator devised freehold lands in successive estates in tail-male. By a codicil he provided that no devisee should acquire a vested interest under the will until he reached twenty-four years of age. *Held*, the limitations to the tenants in tail are executory devises and not contingent remainders. In re *Wrightson* [1904] 2 Ch. 95.

The court conceived the testator's intention to have been that if on the termination of any precedent estate the next devisee should be in esse and under twenty-four years of age, his interest should not fail, as a contingent remainder would, but should remain suspended until he should attain the required age. Hence such interests must be executory devises. This interpretation is interesting in its bearing upon the rule that no limitation shall be termed an executory devise if it can by any means be construed as a contingent remainder, *Planner* v. *Scudamore* (Eng. 1800) 2 B. & P. 289; *Doe* v. *Morgan* (Eng. 1790) 3 D. & E. 763, a rule which early common law judges carried to the extreme of twisting good executory devises into bad contingent remainders. *Adams* v. *Savage* (Eng. 1703) 2 Ld. Raym. 854; *Rawley* v. *Holland* (Eng. 1712) 22 Vin. Ab. 189, p. 11. Under the decision in the principal case this rule is relaxed and its application denied in those cases where the testator's intention is at variance with it.

REAL PROPERTY—LATERAL SUPPORT—WHEN RIGHT OF ACTION FOR DAMAGES ACCRUES. A railroad company made an excavation back of the plaintiff's lot. The excavation was of a permanent nature, such that it would eventually cause the plaintiff's land to slip, although when the action was brought, no actual slipping had occurred. *Held*, a landowner does not suffer damages recoverable at law for injury to lateral support until his soil actually slips. *Kansas City Northwestern R. Co.* v. *Schwake* (Kan. 1904) 78 Pac. 431.

It was contended that the original act of excavating which would cause the subsidence of the land, was itself the infringement upon the right of lateral support. Though the right of lateral support is a natural right, *Schultz* v. *Bower* (1894) 57 Minn. 493, until a man's ordinary enjoyment of his land is interfered with, this right is not infringed. *Backhouse* v. *Bonomi* (1861) 9 H. L. Cas. 503. The actionable wrong consists in allowing the land of the adjoining owner to fall, not in excavating on one's own land. *Williams* v. *Kenney* (1883) 14 Barb. 629.

REAL PROPERTY—PUBLIC RIGHT TO CONSTRUCT A WHARF ON NAVIGABLE WATERS. Brookhaven, by royal grant of 1693, confirmed by Art. 1, § 17, of Constitution of New York, was seized in fee of the land cov-

vered by the waters of Great South Bay. The defendant, seized of certain upland property, by patent of 1697, built a wharf out beyond the high water line. *Held*, the public right of navigation did not include the right to build such wharf, and the defendant was a trespasser. *Trustees of Town of Brookhaven* v. *Smith* (1904), 90 N. Y. Supp. 646.

By the common law in 1693, the fee in all land covered by navigable water was in the King, subject only to the public rights of navigation and fishing. *Fitzwalter's Case* (1673) 3 Keb. 242; *Anonymous* (1673) 1 Mod. 105; also cases cited in *Shively* v. *Bowlby* (1893) 152 U. S. 1, 13. A riparian owner had no right, without license, to build a wharf on land below high water mark. *Blundell* v. *Catterall* (1821) 5 B. & Ald. 268, 298; also cases cited in *Shively* v. *Bowlby*, supra. The plaintiffs therefore by royal grant acquired title to the land below high water mark free from any easement or right other than the public rights of navigation and fishing. The public right of navigation therefore, as held in the principal case, does not include the right to build a private wharf. However the court expresses the opinion that no authority in New York has ever held that an owner of lands bounded by high water has a right to build a dock upon submerged land, the title to which is in another individual or corporation. This doctrine, however, was distinctly laid down in *Rumsey* v. *N. Y. & N. E. R. R. Co.* (1892) 133 N. Y. 79, and approved in *People* v. *Woodruff* (1899) 157 N. Y. 709, the former decision expressly overruling the common law doctrine of *Gould* v. *R. R.* (1852) 6 N. Y. 522. Any grant made to-day of land under navigable water by the State of New York would therefore be subject to every riparian owner's right to gain access to that part of the stream navigable, in fact, by means of a dock; because the State has sanctioned by adjudication this encroachment upon its own absolute title. But the confirmation in Art. 1, § 17, of the State Constitution of the original royal grant is tantamount to a grant to the plaintiff from the State of the same title as was conferred by the royal grant. Having, therefore, created a vested right, the State cannot thereafter destroy it. *Fletcher* v. *Peck* (1810) 6 Cranch 87, 137; *S. S. Co.* v. *Joliffe* (1864) 2 Wall. 450; *Wilmington R. R.* v. *Reid* (1871) 13 Wall. 264.

SALES—EXECUTORY CONTRACT—REFUSAL BY BUYER TO RECEIVE GOODS. The defendants ordered from the plaintiff a cash register, agreeing in consideration of shipment to pay in monthly installments, title remaining in the plaintiff until all the installments should be paid. The contract further provided that on failure to execute notes for deferred payments the full amount of the purchase price should at once become due and payable. The defendants refused to accept the machine when tendered. *Held*, the plaintiff was not limited to damages for breach of contract and was entitled to maintain an action for the price. *National Cash Register Co.* v. *Hill* (N. C., 1904) 48 S. E. 637.

Even though title is not to pass until the complete amount of the purchase price has been paid, the vendor may recover the full contract price from the vendee, and this whether or not the vendee declines to take title. *Wade* v. *Moffett* (1859) 21 Ill. 110. Actual delivery is not necessary; an offer to deliver or readiness is sufficient. *Hunter* v. *Wetzell* (1881) 84 N. Y. 549. The question of title is immaterial to the principal case, and the agreement to pay the purchase price was an independent stipulation. *Dunlop* v. *Grote* (1845) 2. C. & K. 153. The possession and title may be in the plaintiff until the price is paid, but since he has made a delivery the price agreed upon is recoverable. *Marvin Safe Co.* v. *Emanuel* (1845) 2 C. & K. 153.

STATUTES—PENALTIES—STARE DECISIS. A statute required street railways to issue transfers in certain cases and provided a penalty of $50 "for every refusal" to issue them as required. The plaintiff brought

action for several penalties for refusals to issue transfers to him while traveling in the ordinary prosecution of his business and in good faith. *Held*, only one penalty could be recovered in an action, and the institution of an action was a waiver of the plaintiff's right to recover all penalties previously incurred. *Griffin* v. *Interurban St. Ry. Co.* (N. Y. 1904) 72 N. E. 513. See NOTES, p. 156.

SURETYSHIP—CONSTRUCTION OF FIDELITY BONDS—LIABILITY OF SURETY. The defendant was elected cashier of a bank for one year. The bond given by the other defendants as sureties guaranteed his fidelity "during his continuance in office." At the expiration of the first year and for twelve years thereafter, the cashier was successively re-elected. In an action brought upon the bond upon his defalcation, it was *held* that the condition in the bond was restricted by the recital in the by-laws, referring to the appointment for one year and that the sureties were not liable after that year. *Blades* v. *Dewey* (N. C. 1904) 48 S. E. 627.

A fidelity bond is to be interpreted by the same rules as are applicable to any other written agreements. *Ulster Sav. Inst.* v. *Young* (1899) 161 N. Y. 23. General words in the obligation may be limited by the recital, by the subject, or by acts of the parties which tend to show their intention. *Amherst Bank* v. *Root* (Mass. 1841) 2 Metc. 522. *Michigan St. Bank* v. *Wecks* (1856) 28 Vt. 200. The unexpected conclusion is reached that the expression "during continuance in office" is to be interpreted in the light of the term of service prescribed in the by-laws. Only in the application of the contract after its construction has been ascertained is the obligation of the surety strictissimi juris. *Gamble* v. *Cuneo* (1897) 21 N. Y. App. Div. 413, affirmed 162 N. Y. 634. The principal case seems to be in line with the weight of authority.

TORTS—NEGLIGENCE—DEGREE OF CARE REQUIRED OF COMPANY FURNISHING ELECTRICITY. The defendant furnished electricity to the plaintiff's house. The house was burned through the negligent installation of electrical apparatus by an independent contractor. In an action for damages against the electric company it was *held*, that as a matter of law the defendant was under an obligation to inspect such apparatus before supplying a current of electricity. *Hoboken Land and Improvement Co.* v. *Electric Co.* (N. J. 1904) 58 Atl. 1082.

This decision is based on the theory of requiring care proportionate to the danger of one's undertaking, a personal non-assignable duty. *Khron* v. *Brock* (1887) 144 Mass. 516. As in the case of a common carrier, the duty of inspection is absolute. *Louisville, New Albany, and Chicago Ry. Co.* v. *Snyder* (1888) 117 Ind. 435. So high a degree of care is required where the defendant supplies directly both current and apparatus, that if the plaintiff is injured by taking hold of defendant's incandescent lamp, the doctrine of res ipsa loquitur applies. *Alexander* v. *Nanticoke Light Co.* (Pa. 1904) 58 Atl. 1068. The same high degree of care in inspection of apparatus furnished by the agent of a householder was imposed on the electric company, although injury resulted from a defect in such apparatus. *Gilbert* v. *Duluth General Electric Co.* (Minn. 1904) 100 N. W. 653. These decisions show the disposition of the courts to hold electric companies to the highest degree of care, which in view of the danger incident to electricity not properly controlled, seems justified.

TORTS—RIGHT OF THE ADDRESSEE OF A TELEGRAM TO SUE. A broker was the addressee of a telegram which was delayed in transmission resulting in the loss of his commissions. In an action brought by the broker against the telegraph company, it was *held*, that the plaintiff, who was addressee of the telegram, must show that the company knew he was

beneficially interested. *Frazier* v. *Western Union Telegraph Co.* (Or. 1904) 78 Pac. 330.

In the United States the addressee of a telegram has a right of action for delay or error in the transmission. *N. Y. etc. Telegraph Co.* v. *Dryburg* (1860) 35 Pa. St. 298; *Mentzer* v. *W. U. Telegraph Co.* (1895) 92 Ia. 752; 2 COLUMBIA LAW REVIEW 267. The English rule is contrary. *Dickson* v. *Reuter's Telegram Co.* (1879) 3 C. P. Div. 1. Those jurisdictions allowing recovery on the theory of beneficial interests in a contract are of necessity in accord with the principal case. *W. U. Telegraph Co.* v. *Wood* (1893) 57 Fed. 471. Where, however, recovery is allowed in a tort action for breach of the general duty the defendant owes the public by virtue of its calling, it would seem that notice is unnecessary to charge the company. *W. U. Telegraph Co.* v. *Fatman* (1884) 73 Ga. 285; Pollock on Torts, 6th ed. pp. 532–534. The latter view seems the better one.

TRUSTS—EFFECT OF TRUST DEED FOR BENEFIT OF CREDITORS. The defendant unable to pay his debts made an assignment to a trustee of all his real and personal property in trust to pay his creditors. However, he kept a sum of money in his possession and absconded. In a prosecution under a statute making it a felony for an insolvent debtor to abscond with his property, it was *held*, that no irrevocable trust existed as to the money retained, and that the defendant was guilty under the statute. *Rex* v. *Humphris* [1904] 2 K. B. 89.

Where there is an assignment of property to trustees accompanied by a clear declaration of trust, even though the transaction be voluntary, a court of equity will enforce it against the trustees and the author of the trust. *Colman* v. *Sarrel* (1789) 1 Ves. Jr. 50; *Ellison* v. *Ellison* (1802) 6 Ves. 656; 4 COLUMBIA LAW REVIEW 502. An important exception, however, has been established by the English courts in the case of a deed of trust for the benefit of creditors. Such a deed is considered as made by the debtor for his own convenience and subject to revocation or alteration at his discretion, *Walwyn* v. *Coutts* (1815) 3 Sim. 14; *Acton* v. *Woodgate* (1833) 2 My. & K. 492, though a valid trust is thereby created if the creditors have assented to this deed of trust. *Acton* v. *Woodgate*, supra; *Reg.* v. *Creese* (1874) L. R. 2 C. C. 105, but see *Gerrard* v. *Lord Lauderdale* (1830) 3 Sim. 1, contra. The trust deed is irrevocable, also, where the trustees have taken the property and partly executed the trust. *Reg.* v. *Creese* supra; *Johns* v. *James* (1878) L. R. 8 Ch. Div. 744. The doctrine of the English cases is recognized as anomalous and is confined in its operation to the decided cases. *Wilding* v. *Richards* (1845) 1 Coll. 659; Lewin on Trusts, 9th ed., 571. In the United States, however, the rule is more consistent with trust principles. If the assignment for the benefit of creditors is not fraudulent, their assent is presumed and the debtor will have no power to revoke the assignment. *Thomas* v. *Jenks* (Pa. 1835) 5 Rawle 221; *Tennant* v. *Stoney* (S. C. 1845) 1 Rich. Eq. Rep. 222; *Robinson* v. *Shublett* (Tenn. 1845) 6 Humph. 313.

WILLS—GIFT TO DISCHARGE MORAL OBLIGATION—DEATH OF LEGATEE. The testator gave a legacy in discharge of a moral obligation. The legatee died before the testator. *Held*, as it appeared that the legacy was left, not merely as a bounty but to discharge a moral though legally unenforceable obligation, it will not lapse by the legatee's death in the testator's lifetime. *Stevens* v. *King* [1904] 2 Ch. D. 30.

The broad common law rule is that a legacy will lapse where the legatee dies before the testator. *Wright* v. *Horne* (1723) 8 Mod. 222; *Hard* v. *Ashley* (1890) 117 N. Y. 606. But inasmuch as the lapsing of a legacy would seem to defeat the intention of the testator the general tendency of the courts is to restrict rather than to extend the operation of the rule. *Crecelius* v. *Horst* (1880) 9 Mo. App. 51. The following well-defined

exceptions have been grafted on the common law doctrine: a legacy will not lapse when granted to joint-tenants unless they all die during the testator's lifetime, *Dow* v. *Doyle* (1870) 103 Mass. 489; nor will a legacy to a class, though as tenants in common, lapse by the death of one of the legatees before the survivor. The survivors will take the whole. *Cercelius* v. *Horst*, supra. The intention of the testator is also held to keep a legacy from lapsing when it is left to pay debts. *Turner* v. *Martin* (1857) 7 De G. M. & G. 429; *Ward* v. *Bush* (1900) 59 N. J. Eq. 144. Even in the case of debts discharged by a bankruptcy certificate, In re *Sowerby's Trusts* (1856) 2 K. & J. 630, or debts barred by the Statute of Limitations, the death of the legatee before the testator will not cause the legacy to lapse. *Williamson* v. *Naylor* (1838) 3 Y. & C. Ex. 208; *Philips* v. *Philips* (1844) 3 Hare 281. Hence it would seem that the holding in the principal case is clearly justified by the decisions.